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No. 87-574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY J. DeCINTIO,

Petitioner,

— vs. —

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Respondents.

BRIEF OF RESPONDENTS WESTCHESTER COUNTY MEDICAL CENTER AND COUNTY OF WESTCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether, in the factual circumstances presented, an adverse determination of the New York State Division of Human Rights unreviewed in the State Courts dismissing claims of retaliation is entitled to collateral estoppel effect upon non-Title VII retaliation claims later asserted in federal court?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.....6

A. The Court below merely applied preclusion principles under University of Tennessee v. Elliot.....6

B. The Petition seeks review of an interlocutory judgment.....7

C. The issue raised in Petition is no longer apparently presented due to an amendment to the complaint after remand.....8

D. The case does not raise the issue of the procedures utilized by the New York State Division of Human Rights (SDHR).....9

TABLE OF CONTENTS (con't.)

PAGE

E. Petitioner was accorded a four day disciplinary trial under New York Civil Service Law §75 prior to the adverse determination of the SDHR.....10

CONCLUSION.....12

Appendix.....A1

Amended Complaint.....A1

TABLE OF AUTHORITIES

CASES

City of Pompano Beach v. Federal Aviation Administration, 774 F.2d 1529 (11th Cir. 1985).....9

DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986) cert. denied, ____U.S.____, 56 U.S.L.W. 3223 (U.S. Oct. 5, 1987) (No. 86-1946).....2

DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir. 1987).....3, passim

Delgado v. Lockheed Co., A Division of Lockheed Corp. 815 F.2d 641 (11th Cir. 1987) reh. den., en banc 820 F.2d 1231 (11th Cir. 1987).....9

TABLE OF AUTHORITIES (con't.)

PAGE

International Controls Corp. v. Vesco, 556 F.2d 665 (2d Cir. 1977) cert. denied, 434 U.S. 1014 (1978).....8

Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975)....6

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) reh. den., 458 U.S. 1133 (1982).....10

University of Tennessee v. Elliot, ___ US ___, 106 S.Ct. 3220 (1986).....3,4,6

Washer v. Bullit County, 110 U.S. 558 (1884).....8

CONSTITUTION

Fourteenth Amendment to the United States Constitution.....2

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.....2, passim

42 U.S.C. §§1981, 1983.....2, passim

29 U.S.C. §215(a)(3).....2

New York Civil Service Law §75 (McKinney 1983 & Supp. 1987).....1,5,10

New York Civil Service Law §76 (McKinney 1983 & Supp. 1987).....11

STATEMENT OF THE CASE

On February 7, 1985, Petitioner, an Assistant Chief of Respiratory Therapy at Westchester County Medical Center (WCMC), was suspended without pay for thirty days under New York Civil Service Law §75, pending resolution of misconduct and incompetence charges.

On June 26, 1985, following a four day disciplinary trial, Petitioner was discharged from employment having been adjudged guilty of jeopordizing lives of patients in the Emergency Room of WCMC on May 23, 1984 and February 6, 1985.

On November 27, 1985, the New York State Division of Human Rights (SDHR), after an investigation, dismissed Petitioner's human rights complaint which had charged that WCMC retaliated against him for earlier instituting

complaints alleging sex discrimination. The EEOC adopted the determination.*

On December 6, 1985, Petitioner commenced suit in District Court alleging WCMC retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§1981, 1983, the Fair Labor Standards Act, 29 U.S.C. §215(a)(3), and the Fourteenth Amendment.

On March 5, 1986, the District Court dismissed the complaint finding Petitioner's discharge grounded on his serious misconduct and that no genuine triable issue of fact was presented.

On June 8, 1987, a divided Second Circuit Court of Appeals reversed in

*Petitioner was ultimately unsuccessful in his sex discrimination complaint. DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986) cert. denied, ___ U.S. ___, 56 U.S.L.W. 3223 (U.S. Oct. 5, 1987) (No. 86-1946).

part and affirmed in part. Applying University of Tennessee v. Elliott, ____ U.S. ___, 106 S.Ct. 3220 (1986), the majority concluded Petitioner was entitled to further proceedings upon his Title VII claim, but the remainder of his suit was precluded by the adverse administrative determination of the SDHR.

The dissent would have affirmed the dismissal of all claims "[b]ecause the record is clear that DeCintio was dismissed from his hospital employment for gross derelictions of his professional duty and for no other reason . . ." DeCintio v. Westchester County Medical Center, 821 F.2d 111, 118 (2d Cir. 1987).

This petition for a writ of certiorari ensued.

SUMMARY OF ARGUMENT

The petition seeks review of an issue addressed by this Court last year in University of Tennessee v. Elliot, supra, concerning the collateral estoppel effect of administrative adjudications.

No warrant exists for the Court to either re-examine that decision or to review an application of the doctrine of collateral estoppel to a specific factual circumstance. This is especially so when, as here, review is sought of an interlocutory order on an issue which, on the facts, may become academic upon further proceedings, if it has not already become so due to an amendment to the complaint after remand.

The determination of the New York State Division of Human Rights (SDHR)

accorded preclusive effect upon Petitioner's non-Title VII claims is not the only determination involved in this case. Prior to the SDHR determination, Petitioner was accorded a four day disciplinary trial under New York Civil Service Law §75 which the SDHR took into account in its determination.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Court below merely applied preclusion principles under University of Tennessee v. Elliot

At bar, the Second Circuit applied preclusion principles under this Court's very recent decision in University of Tennessee v. Elliot, supra.

Dismissal of Petitioner's non-Title VII retaliation claim (and the remand of his Title VII claim) merely constituted the application of that preclusion doctrine under the facts of this individual case and does not raise important issues requiring review by this Court.*

*Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) is in accord with the ruling below holding that pursuit of administrative remedies under Title VII does not toll the statute of limitations under §1981. Procedural choices thereby presented are both "natural" and "valuable." Id. at 462.

B. The Petition seeks review of an interlocutory judgment

The judgment of the Second Circuit Court of Appeals is interlocutory and the non-final nature of the case strongly militates against the grant of a writ of certiorari.

When proceedings in the District Court are concluded, the petition may be rendered academic. Though remanding the Title VII claim, the majority of the Second Circuit apparently placed minimal credence upon it. 821 F.2d at 116. The dissent considered further proceedings unnecessary due to the absence of genuine triable issues of fact and would have affirmed the dismissal of all claims.

C. The issue raised in the petition is no longer apparently presented due to an amendment to the complaint after remand

Subsequent to remand below, Petitioner amended his complaint apparently rendering the original complaint of no legal effect. Washer v. Bullit County, 110 U.S. 558, 562 (1884); International Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977) cert. denied, 434 U.S. 1014 (1978). The amended complaint, a copy of which is set forth in the Appendix to this brief, alleges no express §1981 or §1983 claim, unlike the original complaint. As a result, that issue upon which a grant of a writ of certiorari is sought, is apparently no longer presented in this case.

D. The case does not raise the issue of the procedures utilized by the New York State Division of Human Rights SDHR

Petitioner's contention that he was denied an opportunity to present his case before the SDHR is at variance with his position in the lower Courts. As established in the Second Circuit's opinion, Petitioner below affirmatively argued that he "fleshed out" his claim of retaliation before the agency which, he admitted, actually investigated his complaint 821 F.2d at 117, 118.*

*Contrary to the argument in the Petition, no conflict exists between the disposition below and City of Pompano Beach v. Federal Aviation Administration, 774 F.2d 1529 (11th Cir. 1985) or Delgado v. Lockheed Co., A Division of Lockheed Corp., 815 F.2d 641 (11th Cir. 1987) reh. den., en banc 820 F.2d 1231 (11th Cir. 1987). Neither involved an SDHR determination nor the concessions present here.

Petitioner's misgivings* over the procedures of the New York State Division of Human Rights are contrary to this Court's analysis of the procedures of that agency in Kremer v. Chemical Construction Corp. 456 U.S. 461, 485-6 (1982) reh. den., 458 U.S. 1133 (1982).

E. Petitioner was accorded a four day disciplinary trial under New York Civil Service Law §75 prior to the adverse determination of the SDHR

Prior to SDHR proceedings, Petitioner was accorded a four day disciplinary trial under New York Civil Service Law §75.

In that proceeding, Petitioner was found guilty of serious misconduct.

*The unsworn statements of other respiratory therapists submitted by Petitioner for the first time in District Court, and around which much of the Second Circuit's opinion revolves, were never presented by Petitioner to the SDHR.

Petitioner did not invoke remedies under New York Civil Service Law §76 according him a right to judicial or administrative review of his discharge from employment.

Although the Second Circuit did not rely upon any preclusive effect of the civil service determination, Respondents argued below that such determination, in and of itself, was entitled to collateral estoppel effect under New York State law.

In any event, the SDHR reasonably took this disciplinary proceeding into account in arriving at its no probable cause determination. The SDHR determination states:

> This determination is based on the following: The investigation revealed that complainant was suspended and subsequently terminated for failure to act

> properly during an emergency situation. Complainant was treated in the manner proscribed by the Civil Service Rules and Regulations and a hearing was held. Complainant was found guilty of misconduct and incompetence by the hearing officer and termination was recommended. There is no evidence that Respondent retaliated against Complainant because he had filed charges of discrimination.

Appendix to Petition, p. 51a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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White Plains, New York
October 30, 1987

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ANTHONY J. DeCINTIO

Plaintiff,

- vs. -

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Defendants.
----------x

AMENDED COMPLAINT
85 Civ. 9551(CLB)

I. Nature of Claim

1. This is a proceeding for declaratory and preliminary and permanent injunctive relief and for damages to redress the deprivation of rights secured to plaintiff by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

2. By this proceeding, plaintiff also seeks similar relief pursuant to 42 U.S.C §1985, the Fair Labor Standards Act, 29 U.S.C. §215(a)(3), and the Fourteenth Amendment to the United States Constitution.

II. Jurisdiction

3. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§1331, 1343, 2201, and 2202, this being a suit authorized and instituted under the Civil Rights Act of 1964.

4. The jurisdiction of this court is also invoked pursuant to 28 U.S.C. §1337 and 29 U.S.C. §216, this being a suit authorized and instituted pursuant to the Fair Labor Standards Act, 29 U.S.C. §§215(a)(3) and 216(b).

5. The jurisdiction of this Court further arises under 28 U.S.C. §1331 and 42 U.S.C. §1985, this being a civil action arising under the Fourteenth Amendment to the United States Constitution and the laws of the United States of Amercia.

III. Plaintiff

6. Plaintiff, Anthony J. DeCintio was employed by defendants in and about April, 1982, as a Staff Respiratory Therapist.

IV. Defendants

7. Defendant, Westchester County Medical Center ("Hospital"), is a public health care facility located in Valhalla, New York, operated by defendant Westchester County ("County"). At all times hereinafter mentioned, defendants had and still have employees subject to the provisions of Section 6 of the Fair Labor Standards Act, 29 U.S.C. §206, in their establishment in which plaintiff was employed.

A. First Cause of Action

8. In June, 1982, and subsequently, plaintiff filed charges of sex discrimination against

defendants, based upon substantially the same facts as the complaint in this action.

9. Thereafter, defendants began to harass plaintiff by treating him more harshly than similarly situated employees and denying him benefits, terms, and conditions of employment provided to similarly situated employees.

10. Specifically, plaintiff was denied promotions for which he was qualified; defendants refused to transfer him to the day shift as he requested until he filed a grievance, although other employees were freely transferred to other shifts at their request; and in October, 1984, plaintiff was disciplined over an argument with another employee, while the other employee, whose conduct was more egregious, was not disciplined.

11. During the first week of February, 1985, immediately after plaintiff received a letter from the Equal Employment Opportunity Commission ("EEOC") stating that it had received a copy of the charge of retaliatory harassment he had filed with the New York State Division of Human Rights, defendants suspended plaintiff without pay. Defendants' purported reason for doing so was based upon two insignificant incidents of alleged misconduct and/or incompetence. In actuality, plaintiff's actions during those incidents either conformed to the policies of defendant Hospital or were the same as or substantially more trivial than similar actions of other employees, for which those other employees were not disciplined.

12. Thirty days after plaintiff had been suspended without pay, when defendants were required by New York Civil Service Law to reinstate him, he was reassigned to a position where his skills were not needed and where no respiratory therapist had ever been assigned previously, although the Hospital's Respiratory Therapy Department where he had previously been assigned was seriously understaffed.

13. After a hearing before a hearing officer selected and paid by defendant County, who found plaintiff guilty of all charges in June, 1985, his employment was terminated on June 26, 1985.

14. Upon information and belief, upon numerous occasions after June, 1982, when plaintiff first filed charges of sex discrimination,

representatives of defendants stated both to him and to others that he would lose in this litigation and other proceedings against defendants and that they would get rid of him.

15. Upon information and belief, defendants' motivation in harassing, suspending, and dismissing plaintiff arose from wilful retaliation against him because of his filing of charges and instituting litigation against them, and defendants' allegations of misconduct and/or incompetence were a mere pretext.

16. Defendants' retaliatory actions against plaintiff violated §704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a).

17. As a result of defendants' harassing, suspending, and dismissing

him, plaintiff has suffered lost wages and benefits.

B. Second Cause of Action

18. Plaintiff restates and realleges the allegations of paragraph 1 through 17 of this complaint as though fully set forth herein.

19. Defendants' retaliatory actions against plaintiff violated §15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. §215(a)(3).

20. As a result of defendants' harassing, suspending, and dismissing him, plaintiff has suffered lost of wages and benefits.

C. Third Cause of Action

21. Plaintiff repeats and realleges the allegations of paragraph 1 through 17 and 19 through 20 as though fully set forth herein.

22. Defendants' retaliatory actions against plaintiff violated the due process clause of the fifth amendment to the United States Constitution, as applied to defendants by the fourteenth amendment to the United States Constitution, and violated 42 U.S.C. §1985.

23. As a result of defendants' harassing, suspending, and dismissing him, plaintiff has suffered irreparable injury to his professional reputation, emotional and mental anguish, and lost wages and benefits.

VI. Relief

WHEREFORE, plaintiff prays that the Court award judgment to him as follows:

A. On the First Cause of Action:

(a) Enjoin defendants from continuing to retaliate against

plaintiff and order his reinstatement with back pay to the date of his dismissal and for the month during which he was suspended without pay.

B. On the Second Cause of Action:

(a) Enjoin defendants from continuing to retaliate against plaintiff and order his reinstatement with back pay to the date of his dismissal and for the month during which he was suspended without pay.

(b) Award plaintiff liquidated damages in an amount equal to his lost wages.

C. On the Third Cause of Action:

(a) Enjoin defendants from continuing to retaliate against plaintiff and order his reinstatement with back pay to the date of his dismissal and for the month during which he was suspended without pay.

(b) Award plaintiff compensatory damages in the amount of $500,000.00 for his emotional and mental anguish and the injury to his reputation.

(c) Award plaintiff $1,000,000.00 in punitive damages for defendants' wilful and malicious actions in retaliation against him.

Together with plaintiff's attorney's fees, costs, and such other and further relief as the Court may deem just and proper.

Dated: White Plains, New York
September 8, 1987

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